

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

H. GERARD HEIMBECKER	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 01-6140
	:	
555 ASSOCIATES, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this day of February, 2003, upon consideration of “Plaintiff”s, H. Gerard Heimbecker, Motion to Stay this Court’s Order Dated February 4, 2003 and Undated Notice Docketed February 11, 2003” (“Motion to Stay”) filed on February 15, 2003 (**Docket Entry No. 33**), and the Response in Opposition to Plaintiff’s Motion for a Stay filed by Defendants 555 Associates *et al.* on February 25, 2003 (Docket Entry No. 34), it is hereby ORDERED and DECREED that the Motion to Stay is DENIED for the following reasons.

Plaintiff has filed a motion entitled “Plaintiff”s, H. Gerard Heimbecker, Motion for Recusal Pursuant to 28 U.S.C.A. § 144” (“Motion for Recusal”) on January 31, 2003 (Docket Entry No. 28) which is currently pending. In an Order entered February 4, 2003, this Court directed the parties to appear before the Court for Oral Argument to address Plaintiff’s Motion for Recusal and any responses thereto, as well as numerous pending Motions to Dismiss filed by Defendants in this matter and Plaintiff’s responses thereto. In his Motion to Stay, Plaintiff contends that this Court’s Order scheduling oral argument on the Motions to Dismiss simultaneously with oral argument on the Motion for Recusal should be stayed, and that oral

argument on Plaintiff's Motion for Recusal should occur prior to, and separately from, oral argument on the Motions for Dismissal.

Plaintiff's pending Motion for Recusal is made pursuant to 28 U.S.C. § 144, which provides:

Whenever a party to any proceeding in a district court makes and files a *timely and sufficient affidavit* that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Plaintiff is correct in asserting that, if Plaintiff's affidavit filed in support of his § 144 Motion for Recusal is found to be "timely and sufficient," and it is found to comply with all of the requirements set forth in § 144, the Court would then be required to "proceed no further," and another judge would be assigned to hear the § 144 proceeding. For this reason, and for purposes of clarification, the Court intends to address the Motion for Recusal first during oral argument. If the Court finds that Plaintiff's § 144 affidavit is "timely and sufficient," and complies with all of the applicable requirements, the Court will not hear oral argument on the Motions to Dismiss, and another judge will be assigned to hear the § 144 proceedings. However, if the Court denies the Motion for Recusal, the Court will proceed to hear oral argument on the Motions to Dismiss.

Plaintiff appears to argue that if the Court denies the Motion for Recusal and then proceeds to hear oral argument on the Motions to Dismiss, Plaintiff will be denied an opportunity to file a Writ of Mandamus to the Third Circuit Court of Appeals on the denial of the Motion for

Recusal. Plaintiff's argument is misplaced. It is well-established in this Circuit that "[a]n adjudication by the judge against whom [a § 144 affidavit] is filed that its allegations are legally insufficient is not a final appealable decision," and furthermore that such an adjudication is not one of the interlocutory decisions that may be reviewed by a court of appeals. Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958). Such an adjudication is subject to review only after a final appealable decision is entered, at which time the adjudication may be reviewed as part of an appeal of the entire matter. See id.; In re School Asbestos Litigation, 977 F.2d 764, 775-76 (3d Cir. 1992) (following the holding in Green but refusing to extend it to the context of denials of motions to recuse pursuant to 28 U.S.C. § 455). Thus, prior to a final appealable decision, Plaintiff is not entitled to file a Writ of Mandamus requesting review by the Third Circuit Court of Appeals of this Court's adjudication as to whether the allegations in Plaintiff's § 144 affidavit are legally sufficient.

Oral argument will proceed as scheduled. Plaintiff's Motion to Stay is DENIED. The Clerk of Court is directed to designate the Motion to Stay (**Docket Entry No. 33**) as no longer pending for statistical purposes.

BY THE COURT:

Legrome D. Davis